SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1938**

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# No. 748

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FORD MOTOR COMPANY,

*Petitioner,*

*vs.*

EDWARD CLARK, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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FORD MOTOR COMPANY,

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EDWARD CLARK, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petitioner, Ford Motor Company, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to hear this cause and to review the decision of the Circuit Court of Appeals in affirming the judgment of the United States District Court for the Western District of Texas. Petitioner respectfully shows this Honorable Court:

1.

### Summary Statement of the Matter Involved.

Since the case went off below on general demurrer (R. 34), the following facts, set up in the amended petition (R. 2), must be taken as true:

In addition to a long term permit fee, Texas requires of corporations an annual franchise tax for the privilege of doing an intrastate business. The tax is laid on capital employed in the business at the rate of 60¢ per thousand for the first million, and 30¢ per thousand for all additional. When the corporation, domestic or foreign, does business in more than one State, the corporation's total capital, wherever located, is allocated to Texas for franchise tax purposes in the proportion that the receipts from Texas business bear to total receipts from all business wherever done. (Art. 7084-85, R. S., 1925, as amended by the Acts of 1931, p. 441.)

The tax is computed on the information required of corporations by Articles 7087 and 7089, R. S., 1925.

Petitioner is a Delaware corporation but has its business domicile in Michigan. It holds a long-term permit to transact business in Texas. Its business is the manufacture and sale of automobiles and parts therefor.

For the taxable year in controversy, petitioner employed in Texas and in connection with its Texas business only $3,079,417.96 of its total capital, but the statute allocated to Texas, as taxable capital for the privilege of doing an intrastate Texas business, $23,157,705.95.

This disparity results largely from the following: (1) Petitioner maintains large and valuable plants in Michigan, where the parts for its motor vehicles are manufactured. These parts are then shipped to Texas and other States, where they are assembled into automobiles and sold. With respect to Texas sales, there are no gross receipts from the Michigan manufacturing activity until the finished product is sold in intrastate commerce. Then the sum total of the results of petitioner's unitary activity, taking place in several States, appears as gross receipts from Texas sales. (2) Petitioner has large investments in stocks of corporations foreign to Texas and owns large amounts of bonds,

notes, mortgages, United States securities and miscellaneous investments. None of this property is located in Texas or used in connection with petitioner's Texas business, but when the Texas formula is applied to this capital, a large part of it is arbitrarily allocated to Texas.

For the period in dispute, petitioner paid its Texas franchise tax, and certain penalties, based on capital assignable to Texas business as allocated by the statutory formula, but under protest to the extent, as claimed by petitioner, that the tax as thus computed fell on petitioner's property outside of Texas and not used by it in connection with its Texas business.

This suit was brought to recover the protest payment. The action is authorized under Texas law. (Acts of 1933, p. 637.)

The Honorable District Court rendered judgment on general demurrer in favor of respondents (R. 34) and the Honorable Circuit Court of Appeals affirmed that judgment (R. 60).

Petitioner claimed

(a) That the disputed tax fell upon property beyond the jurisdiction of the State of Texas to tax, and thus deprived petitioner of its property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 16);

(b) That the disputed tax fell upon activities of the petitioner conducted wholly beyond the confines of the State of Texas and beyond the jurisdiction of the State to tax, and thus deprived petitioner of its property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 17);

(c) That as the disputed tax fell upon property beyond the jurisdiction of Texas to tax, and as that property was

used by petitioner in its interstate and foreign business, the tax was an unreasonable and arbitrary burden on interstate commerce, contrary to Article I, Section 8, of the Constitution of the United States (R. 16).

2.

**Statement Disclosing Basis Upon Which it is Contended this Court has Jurisdiction.**

Jurisdiction of this cause is conferred upon this Honorable Court by Judicial Code, Section 240, as amended; United States Code, Title 28, Sec. 347.

3.

**Questions Presented.**

Is the annual franchise tax, exacted by Texas of foreign corporations (Articles 7084-85, R. S., 1925, as amended by Acts of 1931, p. 441), constitutional as applied to petitioner for the taxable year May 1, 1936, to May 1, 1937, against petitioner's claims:

(1) That as applied to it the exaction deprives petitioner of its property, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that thereby Texas levies a tax upon activities and property beyond its jurisdiction to tax;

(2) That, as applied to petitioner, the exaction places an unreasonable and arbitrary burden upon petitioner's interstate and foreign business, contrary to the provisions of Article I, Section 8, of the Constitution of the United States.

4.

**Reasons Relied on for the Allowance of the Writ.**

The reasons relied on for the allowance of the writ are that the Circuit Court has decided important questions of

Federal law which have not been and should be settled by this Court, and that these questions have been decided in a way probably in conflict with the applicable decisions of this Court.

(1) The Circuit Court of Appeals holds in this case that Texas may graduate its annual franchise tax required of foreign corporations according to the *total* business potency of such corporations without regard to the use, actual or contemplated, of that potency in Texas business. That this may be done in the case of a long term permit fee has recently been settled by *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22. But in that case there is a strong intimation, if not a holding, that *annual* franchise taxes may not be exacted of foreign corporations in relation to total business potency without regard to the use, actual or contemplated, of that potency in intrastate business. In the cited case the court noticed and apparently approved such cases as *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and *Looney* v. *Crane Co.*, 245 U. S. 178, but distinguished them on the ground that they involved only short-term privilege taxes.

(2) In this case the Circuit Court of Appeals holds it is not arbitrary for Texas to apportion capital for franchise tax purposes in proportion to gross receipts realized in Texas. This holding ignores the fact that petitioner's manufacturing business conducted outside the State of Texas which contributes substantially to Texas sales produces no gross receipts except through sales of finished products in the several states in which petitioner does business. Thus the whole of gross receipts from Texas sales is allocated to Texas when fairness requires an apportionment of the receipts from these Texas sales as between Michigan manufacturing and Texas assembly and sales activities. But the statute allows for no such apportionment. This holding is probably in conflict with *James* v.

*Dravo Contracting Co.*, 302 U. S. 134, where, under similar circumstances, West Virginia was denied the right to tax activities carried on without her territorial limits.

(3) The Circuit Court's holding that Texas may tax capital of petitioner used wholly in Michigan manufacturing activities on the sole ground that petitioner later assembles and sells the manufactured products in Texas is probably in conflict with *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, where it is said:

> "The fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state."

(4) The Circuit Court held that although the application of the statutory formula resulted in the allocation to Texas of capital employed in the Michigan manufacturing business, such allocation was not unconstitutional. This holding probably conflicts with the decisions of this Honorable Court in *Looney* v. *Crane Co.*, *supra*; *Western Union Telegraph Co.* v. *Kansas*, *supra*; *Wallace* v. *Hines*, 253 U. S. 66, and *Fargo* v. *Hart*, 193 U. S. 490.

(5) The Circuit Court of Appeals holds that the apportionment of the Texas statute is on a basis of "business done". With all due respect, this is thought to be wholly incorrect. "Business done" is not synonymous with "gross receipts from business done". As applied to petitioner an example of a statute apportioning capital for purposes of taxation on the basis of "business done", as distinguished from "gross receipts from business done", would be where

the statutory formula compared the value of the Michigan manufacturing activity with the value of the Texas assembly and sales activities.

The difficulty with the application of the Texas formula to petitioner's business is that petitioner realizes no gross receipts whatever from its Michigan manufacturing business as such so that if every State in which it does business were to apply the same formula as Texas all of its Michigan capital would be allocated outside of the state except to the extent that Michigan manufacturing activity is represented in actual cash sales of finished products in Michigan. For the year in question the application of the Texas formula in all of the States in which petitioner does business would result in there being allocated to States other than Michigan $336,305,703.12 of its total capital of $504,111,209.10 located in that State (R. 17, *et seq.*). A statutory formula which produces such a result cannot, it is submitted, be sustained under the decisions of this Honorable Court.

It will not do to say, as did the court below, that the existence of this large capital in Michigan in some undefined way adds to the value of the right to assemble and sell automobiles in Texas. A similar contention was made and rejected in *Fargo* v. *Hart, supra.*

Then, too, the statutory scheme of taxation is to measure the value of the Texas privilege solely in relation to capital employed in the exercise of that privilege. There is neither on the face nor in the spirit of the statute evidence of an attempt to measure the value of the Texas privilege in relation to the actual extent or money worth of the exercise of that privilege. That this is true appears conclusively from the fact that Texas tax is decreased or increased as extra State sales increase or decrease while gross receipts from Texas business remain stationary.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Hon-

orable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said court to certify and to send to this Court on a day certain to be therein designated a full and complete transcript of the record and of the proceedings in the Circuit Court of Appeals in said cause, entitled Ford Motor Company, appellant, *vs.* Edward Clark, Secretary of State of the State of Texas, *et al.*, appellees, No. 8664 on its docket, to the end that said cause may be reviewed and determined by this Court, as provided by Section 240 of the Judicial Code, as amended, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provisions of the Judicial Code, and that on hearing before this Honorable Court the judgments of the District Court and of the Circuit Court of Appeals may be reversed by this Honorable Court and such relief granted as is appropriate to the cause.

FORD MOTOR COMPANY,
GAIUS G. GANNON,
By PALMER HUTCHESON,
*Attorney for Petitioner.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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# No. 748

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FORD MOTOR COMPANY,

*Petitioner,*

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EDWARD CLARK, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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### I.

### The Opinions in the Courts Below.

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals is reported in 100 Federal Reporter, 2nd Series, p. 515, and is to be found at page 55 of the Record.

### II.

### Jurisdiction.

Stated under Section 2 of the petition for certiorari.

The judgment and decree of the Honorable Circuit Court of Appeals for the Fifth Circuit at New Orleans to be re-

viewed is dated December 15, 1938 (R. 60), and this petition for certiorari is presented this March 15, 1939.

## III.

### Statement of the Case.

The judgment of the District Court, affirmed by the Circuit Court of Appeals, was rendered on general demurrer to plaintiff's petition. The case, therefore, is that stated in the trial petition in the District Court (R. 2, *et seq.*). In the interest of brevity and a ready understanding of the case the salient facts are summarized below.

The Texas franchise tax act, Articles 7084-85, R. S., 1925, as amended by the Acts of 1931, page 444, reads as follows:

> "ARTICLE 7084. Amount of Tax.—(a) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, on or before May 1st of each year, pay in advance to the Secretary of State a franchise tax for the year following, based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rates for each one thousand dollars ($1000) or fractional part thereof; One dollar ($1) to one million dollars ($1,000,000), sixty cents (60¢); in excess of one million dollars ($1,000,000) thirty cents (30¢); provided that such tax shall not be less than ten dollars ($10) in the case of any corporation, including those without capital stock. * * * the tax shall be computed from the data contained in the reports required by Articles 7087 and 7089."

Article 7087 and Article 7089, Revised Civil Statutes of Texas, 1925, provide for the filing of reports by foreign cor-

porations with the Secretary of State between January 1st and March 15th of each year, on blanks furnished by the Secretary, showing the condition of the corporation on the last day of its preceding fiscal year which, in the case of plaintiff, coincides with the calendar year. The reports require information showing the cash value of all gross assets of the corporation, the amount of its authorized capital stock, the capital stock actually subscribed, and the amount paid in, the surplus and undivided profits or deficits, if any, the amount of mortgage, bonded and current indebtedness, the total gross receipts of the corporation from all sources, and the gross receipts from business done in Texas for the fiscal year preceding with detailed balance sheet and income and profit and loss statements, in such form as the Secretary of State may prescribe.

The principal business of Ford Motor Company, a Delaware corporation, is that of a manufacturer and vendor of automobiles and self-propelled motor vehicles and parts therefor (R. 6).

The company's fiscal year coincides with the calendar year (R. 6).

Petitioner's Texas business is conducted in the following way:

> "Petitioner owns and operates within the State of Texas assembly plants. No parts for the self-propelled motor vehicles sold by petitioner are manufactured at said assembly plants or at any other point within the State of Texas. All of said parts are manufactured at plants outside of the State of Texas, located for the most part in the State of Michigan. The manufactured parts are shipped from Michigan and other points outside of the State of Texas to petitioner's assembly plants in Texas, and are there assembled or put together into finished, self-propelled motor vehicles. The assembled vehicles are then sold in intrastate commerce to various dealers, who in turn sell said vehicles to the public. Some of the vehicles assembled at the

Texas plants are sold in interstate commerce, but by far the biggest part thereof is sold, as aforesaid, to Texas dealers in intrastate commerce'' (R. 6-7).

The following statistical data in respect to petitioner's business for the fiscal year 1935 is material. It appears at various places in the trial petition (R. 2, *et seq.*), but for convenience is tabulated as follows:

| | |
|---|---|
| Gross receipts from business done in Texas | $34,272,887.72 |
| Gross receipts from business done outside of Texas | 854,072,087.75 |
| Total gross receipts from all business done both in and out of Texas | 888,344,975.47 |
| Ratio of receipts from business done in Texas to total gross receipts | 3.8580606% |
| Total taxable capital at December 31, 1935 | 600,242,151.57 |
| Capital allocated to Texas by statutory formula (3.8580606% of $600,242,151.57) | 23,157,705.95 |
| Full true value of assets located in Texas or used or devoted to Texas business at December 31, 1935 | 3,079,417.96 |
| Excess capital allocated by statutory formula over full true actual value of assets located in or used in or devoted to Texas business at December 31, 1935 | 20,078,287.99 |

Ford Motor Company has large investments in stocks of corporations foreign to Texas and owns large amounts of bonds, mortgages, notes, United States securities, municipal and state securities, and miscellaneous investments. None of this property is used, held or located in Texas or in connection with petitioner's Texas business (R. 12).

The Texas statutory formula, when applied to Michigan business, results in allocating out of Michigan into other States $336,305,703.12 of a total of $572,397,253.13 of Michigan assets (Exhibit X to the petition, immediately following Exhibit A, which follows page 26 of the Record). Further data demonstrating how the statutory formula, when

applied to Michigan business, operates to create a deficit in Michigan capital, said capital being neither in Texas nor used in connection with petitioner's Texas business, appears in Exhibit Y to the petition (R. 29).

Although petitioner's capital investment falls into fifteen separate classifications, there is neither located in Texas nor used by petitioner in, or in connection with, its Texas operation, any capital in eight of those fifteen classifications (Exhibit A to the petition, R. following p. 26).

Petitioner's pleadings adequately raise the Federal questions set out under "Questions Presented" in the petition for certiorari. See paragraphs XXII and XXIII of the amended petition (R. 16, *et seq.*).

## IV.

## Specifications of Error.

1.

The Honorable Circuit Court of Appeals erred in holding that Texas may graduate the annual franchise taxes required by it of foreign corporations according to the business potency of such corporations, without regard to the use, actual or contemplated, of that potency in Texas business during the year for which the tax is collected.

2.

The Circuit Court of Appeals erred in holding that it is not arbitrary for Texas to apportion petitioner's total capital to Texas for franchise tax purposes in proportion to gross receipts realized from Texas business, when none of the unitary activities of petitioner which take place in several States and combine to make Texas sales possible are reflected in total gross receipts except through intrastate sales in Texas.

3.

The Circuit Court of Appeals erred in holding that Texas may tax petitioner's capital located beyond the confines of the State and used wholly in Michigan manufacturing activities on the sole ground that petitioner later assembles and sells the manufactured products in Texas.

4.

The Circuit Court of Appeals erred in holding Texas may constitutionally measure the value of the annual privilege extended foreign corporations to transact business in Texas in relation to capital employed and activities conducted by such corporation beyond the confines of the State, it affirmatively appearing that such capital and activities do not add in any legal sense to the value of the Texas privilege.

5.

The Circuit Court of Appeals erred in holding that the Texas Statute, Articles 7084-85, R. S., 1925, as amended, apportions capital on the basis of business done.

6.

The Circuit Court of Appeals erred in holding that Articles 7084-85, R. S., 1925, as amended, as applied to the petitioner, for the taxable year in controversy, does not result in the State of Texas levying a tax on capital and assets beyond the power of the State of Texas to tax contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7.

The Circuit Court of Appeals erred in holding that Articles 7084-85, R. S., 1925, as amended, as applied to peti-

tioner, for the taxable year in controversy, does not result in the State of Texas levying a tax on activities of petitioner beyond the power of the State of Texas to tax contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

8.

The Circuit Court of Appeals erred in holding that petitioner's first amended original petition failed to allege sufficient facts to show that, as applied to petitioner, Articles 7084-85, R. S., 1925, as amended, applicable to foreign corporations, operates as an unreasonable and arbitrary burden upon interstate and foreign commerce, in violation of Article I, Section 8, of the Constitution of the United States.

## V.

## ARGUMENT.

### Summary of the Argument.

*Point A.*

The statute, as applied to petitioner, taxes petitioner's capital beyond the jurisdiction of the State of Texas to tax.

*Point B.*

The statute, as applied to petitioner, taxes petitioner's activities beyond the jurisdiction of the State of Texas to tax.

*Point C.*

The statute, as applied to petitioner, taxes petitioner's property beyond the jurisdiction of the State of Texas to tax, and as that property is used by petitioner in its interstate and foreign business, the statute lays an unreasonable and arbitrary burden upon petitioner's interstate and foreign business.

**Points A and B.**

These points are closely related and will be treated together.

It is well established that a state has no jurisdiction to tax property or activities of foreign corporations beyond its boundaries, *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Looney* v. *Crane Co.*, 245 U. S. 178; *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, and that the only reason for allowing a State to look beyond its borders when taxing property or activities of a foreign corporation is that it may get *the true value of things within it*, *Wallace* v. *Hines*, 253 U. S. 66. The principle has been given practical application in the case of unitary corporations owning property and conducting activities partly within and partly without a State, *James* v. *Dravo Contracting Co.*, *supra*; *Hans Rees' Sons* v. *North Carolina*, *supra*.

It is also well established that the introduction of an extremely complicated method for calculating the amount of an exaction does not change the nature or mitigate the burden of the tax, *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203; that a formula may be fair on its face but unconstitutional in its application to a particular taxpayer, *Hans Rees' Sons* v. *North Carolina*, *supra*; *Norfolk & Western Railway Co.* v. *North Carolina*, 297 U. S. 682, and that when constitutional objections are urged to a method or basis of taxation the *amount* demanded is unimportant if the method or basis of taxation has no legitimate foundation, *Alpha Portland Cement Co.* v. *Massachusetts*, *supra*; *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460.

What is the practical operation of the Texas franchise tax act on petitioner's extra State capital and activities?

The company owns and operates large and valuable manufacturing plants in the State of Michigan. Parts for its

motor cars are manufactured almost entirely in that State. These parts are then shipped to Texas where they are assembled into finished products and sold in intrastate commerce. No gross receipts are derived from any part of the unitary activities taking place partly within and partly without Texas until an intrastate sale occurs. But gross receipts from such sales represent the value not alone of the Texas assembly and sales operation but as well, and in a substantial measure, the value of the Michigan manufacturing business and the capital devoted to it. In fact that business and capital contributes far more to the resultant gross receipts than do the Texas assembly and sales operations.

Thus by the device of allocating capital on a basis of "gross receipts from actual sales" rather than on a basis of "business done", Texas apportions to itself so far as it is represented in Texas sales the whole of the capital necessary to the conduct of the important manufacturing business carried on outside her boundaries. It was held under similar circumstances in *James* v. *Dravo Contracting Co.*, *supra*, where a tax was measured by gross receipts, that:

> "West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State *and an apportionment would in any event be necessary to limit the tax accordingly.*"

The Circuit Court placed much reliance on the fact that the tax is one on a local privilege. However we are not concerned with the nature of the tax but with its constitutional operation as applied to one situated as is petitioner. True it is that the tax is on a local privilege; but it is equally true the taxing scheme is to measure the value of that privilege in relation to capital actually employed in the prosecution of

the local privilege, *Investment Securities Co. of Texas* v. *Meharg*, 115 Tex. 441, where it is said:

> "Thus the franchise tax levied on such corporations must have for its basis total gross assets employed by the corporation in the transaction of its business in Texas."

The question here is not the right of Texas to apportion capital on some fair basis. It is rather, does the statute, as applied to one situated as petitioner, actually carry out the legislative scheme of taxation within permissible limits.

*Wallace* v. *Hines*, *supra*, involved a precisely similar question. There North Dakota exacted a franchise privilege tax of railroad corporations doing business within the State. As does the Texas tax here involved, North Dakota's levy fell upon capital at a definite rate per unit. The statute provided for apportionment between States where corporations were engaged in business in more than one State. In the case of railroads apportionment was on a basis of mileage within and without the State. The question ruled in *Wallace* v. *Hines* was the fairness, in the light of the legislative scheme of taxation, of the method of apportionment as applied to a particular taxpayer. That is the question involved here. The North Dakota Act as applied to the taxpayer there involved was held unconstitutional for the sole reason that the mileage method of allocation adopted by North Dakota did not fairly approximate the railroad's capital actually used in North Dakota business. Here the gross receipts method of allocation tested by the legislative scheme of taxation inaccurately and unfairly apportions to Texas almost eight times more capital than petitioner uses in its Texas business. Should the other States in which petitioner does business adopt similar statutes practically the whole of petitioner's Michigan capital would be allocated out of Michigan and to these other

States. Of a total of $23,157,705.95 allocated by the statute to Texas $18,907,033.15 is directly traceable to petitioner's Michigan plant and to its investments there. None of this property is in any true sense even remotely related to the petitioner's Texas assembly and sales business. The Circuit Court seems to have fallen into four distinct errors:

(1) It ruled the case on the authority of *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412. In the light of the scheme of taxation evidenced by the Texas statute which is based upon capital about to be employed in business there is no room for the application of the principles announced in that case.

(2) It ignored the fact that capital about to be used in Texas business is the sole statutory measure of the value of the privilege taxed. Having done so, the court proceeded to decide the fairness of the *amount* of the tax.

(3) It misconceived the statute as one providing for apportionment on the basis of "business done" rather than on the basis of "gross receipts from business done". Having done so, it held that the burden rested upon petitioner to determine the relative value of its intra and extra State activities in relation to gross sales. Such a separation could be given no legal effect under a scheme of taxation, such as that contained in the statute here, which falls alone on capital and does not concern itself with the value or extent of activities carried on with that capital. Petitioner can meet this burden only when the State shall have amended the statute to change its scheme of taxation so as to let the incidence of the tax fall upon the extent and value of the exercise of the privilege rather than upon capital.

(4) It held in effect that Texas may tax the whole of the capital devoted to a unitary activity consisting of the manu-

facture, assembly, and sale of motor cars regardless of the fact that the unitary activity takes place in several States. Even if, in the face of the statute, it be conceded that the court rightly construed the legislative scheme of taxation, this holding is insupportable. Texas may not tax capital devoted to a Michigan manufacturing business on the sole ground that the manufactured product is later shipped to and sold within the State of Texas. *James* v. *Dravo Contracting Co., supra.* The facts differ radically from those involved in *Great Atlantic & Pacific Tea Co.* v. *Grosjean, supra,* where extra State capital and activities added in a clear, direct, and unmistakable way to the value of an activity carried on within the State. Compare *Western Union Telegraph Co.* v. *Kansas, supra,* and *Looney* v. *Crane Co., supra.*

The Circuit Court says:

> "The value of the property as located in the several states would not be a reasonable basis of apportionment. Under such a basis this company could manufacture wholly in another state and sell its cars in Texas without any local investment and pay no taxes there for the very valuable sales privilege."

This statement is not impressive when one considers that under the statute the company could manufacture wholly in Texas and sell its entire output in other States and still pay no tax for the very valuable manufacturing privilege. Both considerations prove too much. Plainly Texas has adopted a formula which, when applied to many unitary corporations conducting activities in several States, will fairly apportion capital between States.

But this is not to say it does so in the case of petitioner and others similarly situated. *Hans Rees' Sons* v. *North Carolina, supra; Norfolk & Western Railway Co.* v. *North Carolina, supra.*

The Circuit Court places much reliance upon certain *dicta* contained in *Southern Realty Co.* v. *McCallum*, 65 F. (2d) 934. It was there said:

> "When the corporation is to do business in other states also, avoidance of a trespass on interstate commerce or on that done beyond the territorial jurisdiction of the taxing state, is secured by apportioning the business potency of the corporation represented by its business capital according to the business actually done during the preceding calendar year in the taxing state as indicated by gross receipts, compared with all its business everywhere."

To the extent that the quoted language may be said to justify the actual results of the Texas Statute upon petitioner it is squarely in conflict with what has been said by this Court in similar cases. Compare *Wallace* v. *Hines, supra; Hans Rees' Sons* v. *North Carolina, supra,* and *James* v. *Dravo Contracting Co., supra.*

In short, the case comes to this: Texas has adopted a statute which, when applied to a unitary business carried on in several States such as that of petitioner, allocates to Texas the entire activity and property of the business wherever situated to the extent that that unitary activity and property results in sales in Texas.

The situation would be plainer, although no different, if Ford Motor Company sold all of its Michigan manufactured products in Texas. In that event its entire capital and business would be allocated to Texas by the statute.

It is clearly alleged in the petition that much of petitioner's property consisting of patents, stocks of foreign corporations, bonds, mortgages, notes, United States and municipal and State securities is neither in Texas nor used by the petitioner in connection with its Texas business but the Circuit Court suggests that this property in some indefinable way adds to the value of the Texas privilege. The

argument was made, thoroughly considered, and rejected in *Fargo* v. *Hart*. 193 U. S. 490.

**Point C.**

This point is largely covered by the argument under Points A and B upon which it depends. It is clearly alleged in the petition that petitioner's Michigan capital is devoted in a substantial part to petitioner's interstate and foreign business. Obviously if the result of the Texas Statute is to place an unsupportable exaction on petitioner's extra State capital devoted in substantial part to interstate and foreign business the statute violates the commerce clause.

**Conclusion.**

It is respectfully submitted that this case calls for the exercise by this Court of its supervisory power. The questions involved are important and of far reaching application. Every manufacturing corporation which manufactures outside of Texas and sells within Texas is unconstitutionally affected by the statute. We, therefore, respectfully pray that this Court forthwith review the decision of the United States Circuit Court of Appeals for the Fifth Circuit and the decision of the District Court of the United States for the Western District of Texas.

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